DEC 19 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES.

No. 13, Orig.

OCTOBER TERM, 1955.

STATE OF WISCONSIN,
Plaintiff,

v.

STATE OF TENNESSEE,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT.

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SUPREME COURT OF THE UNITED STATES.

No. .....

OCTOBER TERM, 1955.

STATE OF WISCONSIN,
Plaintiff,

v.

STATE OF TENNESSEE,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT.

MAY IT PLEASE THE COURT:

The State of Wisconsin is endeavoring to invoke the original jurisdiction of this Court and has filed a motion for leave to file a complaint against the State of Tennessee, a proposed complaint, and a brief in support of the motion. The State of Tennessee opposes Wisconsin's motion for the reasons stated in this brief.

STATEMENT OF THE CASE.

The State of Wisconsin seeks to bring its action in a twofold capacity:

(1) as a parens patriae of its citizens and particularly its dairy industry, and

(2) in a proprietary capacity because of its interest in tax revenues which it intimates might suffer because of the Tennessee statute complained of.

The proposed complaint avers the extent and importance of the dairy industry in the State of Wisconsin and that Wisconsin producers sell substantial quantities of milk in the State of Tennessee. The proposed complaint further avers that Chapter 74 of the Public Acts of Tennessee of 1955 is invalid because violative of the commerce clause of the Federal Constitution, Article I, Section 8, clause 3, and because it denies equal protection of the laws to Wisconsin producers desiring to sell milk in Tennessee and is therefore in violation of the Fourteenth Amendment to the Constitution of the United States. The plaintiff prays that this Court declare that the statute in question is unconstitutional; that the State of Tennessee be enjoined from enforcing said statute; and for general relief. A copy of Chapter 74 of the Public Acts of Tennessee of 1955 is exhibited to the proposed complaint.

ARGUMENT

I. The Tennessee Statute Under Attack Does Not Place an Undue Burden on Interstate Commerce and It Does Not Deny to Wisconsin Producers and Shippers the Equal Protection of the Laws.

In its brief the State of Wisconsin takes the position that the Tennessee statute assailed is unconstitutional because it is a direct and undue burden on interstate commerce and it is a denial of the equal protection of the laws to persons from the State of Wisconsin who go to Tennessee for the purpose of selling their milk. The State of Tennessee takes the position that the statute is not unconstitutional for either of the reasons advanced by Wisconsin. The purpose of the statute is to make unlawful certain marketing practices, only if done within intent to injure or destroy competition or with intent to create a monopoly. Wisconsin seeks to infer that subsection (a) of Section 3 of the Act is applicable only to that milk that has been transported in interstate commerce, but such is not the case. This subsection prescribes the sale of certain milk products, if done with unlawful intent, at below the prevailing wholesale or retail price at the place of sale provided such products have been prepared or processed for resale, and have been transported into said marketing area from any point outside of said marketing area. Section 2 of the Act defines a marketing area as being a county in which there is located a municipality having an ordinance regulating the grade of milk and milk products. The Commissioner of Agriculture has authority to prescribe other marketing areas. It will thus be seen that subsection (a) of Section 3 is applicable to milk flowing exclusively in intrastate commerce if the milk is transported into a marketing area. The other restrictions in the Act clearly apply to intrastate as well as interstate

commerce because they are directed against certain practices whether the products have been transported into a marketing area or not. We therefore respectfully contend that by any reasonable construction of the Act it cannot be maintained that persons outside the State of Tennessee are denied the equal protection of the laws. The law is applicable to all who commit such acts as to bring themselves within its terms.

Neither is the statute invalid as being an undue burden on interstate commerce. In its contention to the contrary Wisconsin places strong reliance on the cases of **Baldwin v. Seelig,** 294 U. S. 511; **Hood v. DuMond,** 336 U. S. 525, and **Dean Milk Company v. City of Madison,** 340 U. S. 349. Analysis of these cases demonstrates that they are not authority for Wisconsin's contention. **Baldwin v. Seelig** dealt with an attempt by the State of New York to prevent the sale therein of milk that had been purchased from producers in Vermont at less than the price required to be paid to New York producers. This Court held such action invalid as a burden on interstate commerce. In **Hood v. DuMond,** the State of New York had denied a license for the establishment of a receiving plant from which milk was to be shipped in interstate commerce. This denial was based on the ground that operation of the plant would tend to destructive competition in a market that was already adequately served. This Court held that such action on the part of the State of New York violated the commerce clause. In **Dean Milk Company v. City of Madison** this Court struck down an ordinance prohibiting the sale of milk in Madison, Wisconsin, unless the same had been pasteurized within a radius of five miles of the municipality. Thus it will be seen that the cases relied upon by Wisconsin dealt with absolute barriers to the free flow of commerce between the States.

An entirely different situation is presented by the Tennessee statute now under attack. Here there is no pro-

hibition of the flow of milk into or out of the State of Tennessee. All that is required of out of State producers and shippers is that they do not engage in certain pricing practices which the State of Tennessee, in its sovereign capacity, has deemed to be harmful if done with monopolistic intent or with intent to injure or destroy competition. The statute is applicable to all alike and its effect on interstate commerce is only incidental. Persons who sell milk within the same market area in which it is produced are not unregulated, because they are forbidden to sell at less than cost to the seller. Subsection (d), Section 1, Chapter 74 of the Public Acts of Tennessee of 1955. By subsections (b) and (c) of the same Section other regulations are imposed upon the sale of milk, whether it has been transported into the marketing area or not. Here there is no rigid pricing system because no official of the State of Tennessee is vested with authority to fix the price at which milk may be sold. To the contrary, the Act is designed to the end that the price of milk seek its own normal level, unaffected by destructive, competitive practices. In the case of **Milk Control Board v. Eisinberg Farm Products**, 306 U. S. 346, this Court considered the validity of a statute which authorized the Milk Control Board to set prices paid to producers for milk. This Act was held not to be invalid even as it applied to that milk which was to be shipped in interstate commerce, because its burden on interstate commerce was only incidental. A similar situation was before this Court in the case of **Cities Service Gas Company v. Peerless Oil and Gas Company**, 340 U. S. 179, wherein this Court approved the action of the Oklahoma Corporation Commission in fixing prices for gas that was to be taken from a certain field, although such gas was to be transported in interstate commerce. In the case last cited, the Court said:

> "It is now well settled that a state may regulate matters of local concern over which federal authority

has not been exercised, even though the regulation has some impact on interstate commerce. Parker v. Brown, 1943, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315; Milk Control Board of Pennsylvania v. Eisenberg Farm Porducts, 1939, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752; South Carolina State Highway Dept. v. Barnwell Bros., 1938, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734. The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. South Carolina State Highway Dept. v. Barnwell Bros., supra. Compare Leisy v. Hardin, 1890, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128, decided prior to the Wilson Act, 26 Stat. 313, 27 U. S. C. A., sec. 121, with In re Rahrer, 1891, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, decided thereafter."

We respectfully insist that the Tennessee statute meets the requirements stated above. As already pointed out, Chapter 74 does not discriminate or place an embargo on interstate commerce. It is applicable to intrastate commerce as well, and it is not designed to erect any barriers against the products coming to Tennessee from other States. It safeguards an obvious State interest in that its purpose is solely to prevent those practices which are done with monopolistic, destructive or injurious intent. Clearly, this local interest outweighs whatever national interest there might be in permitting milk to be so shipped into and sold in the State of Tennessee, completely free from all regulation even of an incidental nature, and regulation which we submit is not unduly burdensome.

II. The State of Wisconsin Is Not a Proper Party Plaintiff to Bring This Action.

The State of Tennessee also takes the position that the State of Wisconsin is not a proper party plaintiff to bring this action. We begin with the well settled principle that only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity. **Alabama State Federation of Labor v. McAdory**, 325 U. S. 450.

This principle was given expression in **United Public Workers v. Mitchell**, 330 U. S. 75, in which certain governmental employees sought injunctive and declaratory relief against the Hatch Act, on the ground of its validity. This Court reached the merits of the case as to only one of the plaintiffs, holding that the others were not entitled to relief. The complaint, together with affidavits filed in support thereof, failed to state grounds for relief even though it was averred generally that these plaintiffs desired to engage in the type of political activity that was forbidden by the Act. The complaint here fails to state grounds for relief because of the absence of any allegation that any Wisconsin producers or shippers have done any act, and with the required intent, that would bring them within the terms of the statute. There is no allegation that the statute has impeded or diminished the flow of milk from Wisconsin into the State of Tennessee, nor is there any allegation that such milk, after reaching the State of Tennessee, is disposed of or desired to be disposed of in the manner made unlawful by the statute. We are not unaware of the holdings in **State of Georgia v. Pennsylvania Railroad Company**, 324 U. S. 439, and **Pennsylvania v. West Virginia**, 262 U. S. 553. The Georgia case was a suit to enjoin a conspiracy to fix freight rates, and there it was clear that the conspiracy was in existence and that the damage was being done. Pennsylvania v.

West Virginia dealt with an immediate and unequivocal threat to cut off the supply of gas to the complaining State. In each of those cases harm was done or threatened to the citizens of the plaintiff States regardless of anything that they might do or fail to do.

The situation here is entirely different because the Tennessee statute is not applicable to any person who does not perform certain acts with a certain intent. Tennessee does not insist that in order to test this law the citizens of Wisconsin must subject themselves to harsh penalties and the expenses of burdensome litigation. We do contend, however, that the well established rules of law with regard to the parties that may maintain suits be adhered to. The question of the right of a party to maintain a suit attacking the validity of this statute is a serious one that can be determined only after a searching and detailed inquiry. Such an inquiry can be conducted in the United States District Courts by any party who deems himself aggrieved by the Tennessee Act. Such a suit is now pending in the United States District Court for the Middle District of Tennessee at Nashville, and a transcript of the pleadings and orders in said suit is annexed to this brief as an exhibit. Obviously the character of inquiry necessary is ill-suited to the framework of an original proceeding in the Supreme Court of the United States. No reason suggests itself why the citizens of Wisconsin should not resort to their more adequate remedy in the local, Federal or State Courts. This suit is an obvious attempt to short-circuit the more orthordox procedures and deemphasize the question that should be considered at the very threshold of any judicial inquiry, does the plaintiff have a right to maintain the suit?

III. Under the Rules of Constitutional and Statutory Construction, the Motion Should Be Denied.

Under the well known rules of constitutional and statutory construction, this Court should deny Wisconsin's motion.

This Court, as well as the Supreme Court of Tennessee, has adopted the rule that where an act is capable of constitutional construction, it is the duty of the Court to so construe the statute to the end that it may be held constitutional rather than to the contrary. **Morrison v. Crews et al.** (1950), 192 Tenn. 20, 237 S. W. 2d 1; **United States v. Harriss,** 74 S. Ct. 808, 812, 347 U. S. 612; **Dennis v. United States,** 71 S. Ct. 857, 341 U. S. 494. It follows that an infraction of a constitutional provision is not to be assumed. This Court reasoned in **Corporation Commission of Oklahoma v. Lowe,** 50 S. Ct. 397, 281 U. S. 431, in discussing the Fourteenth Amendment in connection with a State statute, that, on the contrary, it is to be presumed that the state in enforcing its local policies will conform its requirements to the federal guaranties. At 50 S. Ct. 397, this Court declared:

> "Doubts on this point are to be resolved in favor of, and not against, the state."

This Court has also announced that it will presume that a statute couched in general terms is not intended to regulate that over which a state legislature had no authority. **Bank of the United States v. Halstead,** 23 U. S. 51, 10 Wheat. 213, 6 L. Ed. 606.

In determining whether the motion should be denied, the issue to be determined by the Court is whether any set of facts either known or which could be reasonably assumed affords support for the application of the statutes. **United States v. Carrolene Products Company,** 58 S. Ct. 278, 304 U. S. 144.

These rules poignantly demonstrate that the Court should indulge every intendment of constitutional and statutory construction in favor of the validity of the statute.

The plaintiff virtually concedes the futility of its position by the declarations made on page 37 of its brief in support of the motion. The plaintiff argues:

> "While no allegation is made that any citizen or resident of the state of Wisconsin has been arrested under the Tennessee law, and that the state of Tennessee is actively enforcing its statute against the citizens of the state of Wisconsin, the cases appear to establish that a state need not sit idly by and wait till the damage is actually done before it proceeds against an invalid and discriminatory statute of another state. Producers and processors of milk in the state of Wisconsin should not be compelled to take their huge tank trailers of fluid milk to the state of Tennessee to risk an arrest and the destruction of their valuable cargo before a controversy would exist, of which the courts of justice would take cognizance."

No fact is alleged showing discrimination as to Wisconsin producers and processors. Neither can the act be reasonably construed to permit or authorize the destruction of any milk hauled in tank trailers into Tennessee. The fallacies in such reasoning are apparent. Such assumed facts are highly speculative and conjectural.

In effect the statements quoted admit that Wisconsin has suffered no injury and that Tennessee has done nothing to injure the Wisconsin dairy industry or to reduce her revenues. The conclusion to be drawn from the argument is that, if the motion should be granted and the petition filed, there is no factual situation which can be proved to show an unconstitutional application of the statute. Thus, the

well-known rule that one who attacks the constitutionality of a statute has the burden of showing its unconstitutionality will be subverted. **Corporation Commission of Oklahoma v. Lowe,** supra; **Williams v. Moore and City Council of Baltimore,** 53 S. Ct. 431, 289 U. S. 36, 27 L. Ed. 1015; **Pacific States Box and Basket Company v. White,** 56 S. Ct. 159, 296 U. S. 176, 80 L. Ed. 138, 101 A. L. R. 853; **Bourjois Inc. v. Chapman,** 57 S. Ct. 691, 301 U. S. 183, 81 L. Ed. 1027. The rule has been applied also where there has been a collision of state interests. **State Farm Mutual Automobile Insurance Co. v. Duel,** 65 S. Ct. 573, 324 U. S. 154, 89 L. Ed. 812, rehearing denied, 65 S. Ct. 856, 324 U. S. 887, 89 L. Ed. 1436.

There must be facts alleged which state a cause of action under accepted legal practices. The amount, if any, of which the state's revenues might be adversely affected is highly speculative and, at the most, the interests of Wisconsin are remote and indirect. This is fatal. **Minnesota v. Northern Securities Company,** 194 U. S. 48, 24 S. Ct. 598, 48 L. Ed. 870.

In the final analysis this is an attempt by the State of Wisconsin to strike down a Tennessee statute because it contravenes the notions of certain public officials of Wisconsin as to what the public policy of Tennessee should be. But the mere fact that a state moves to be permitted to file its petition is insufficient within itself to invoke the original jurisdiction of this Court. **Florida v. Melon,** 273 U. S. 12, 47 S. Ct. 265, 266, 71 L. Ed. 511.

CONCLUSION.

The State of Tennessee respectfully insists that Chapter 74 of its Public Acts of 1955 is a valid and constitutional enactment and that it is not offensive under either the commerce clause or the Fourteenth Amendment to the Constitution of the United States.

We further contend that the State of Wisconsin is not a proper party to maintain this suit, and that to permit the complaint to be filed will have the effect of foreclosing an inquiry into matters of vital concern. If Wisconsin is permitted to proceed, this action will resolve itself into an attack upon a statute duly enacted by a sovereign State, and the issues will be presented only upon a vague and hypothetical basis.

The State of Tennessee respectfully insists that Wisconsin should be denied leave to file this complaint.

Respectfully submitted,

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Certificate of Service.

The undersigned, a member of the bar of the Supreme Court of the United States and one of the counsel of record for the defendant, hereby certifies:

That on the 5th day of December, 1955, he served the within and foregoing reply brief upon the sovereign State of Wisconsin, the movant and plaintiff in said action, in the following manner, as prescribed by Rules 9 and 33 of said Court:

He deposited at the post office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing reply brief, securely enclosed in an envelope, air mail postage duly prepaid, addressed to each of the following officials of the said plaintiff State, respectively, at his post office address, as stated below, that is to say:

Honorable Walter J. Kohler,
Governor of the State of Wisconsin,
State Capitol,
Madison, Wisconsin.

Honorable Vernon W. Thompson,
Attorney General of the State of Wisconsin,
114 East,
State Capitol,
Madison 2, Wisconsin.

.....

Knox Bigham.

EXHIBIT.

(Copy)

In the
United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation, Plaintiff, v. George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee, Defendants.	No. 2015. Equitable Relief Requested.

COMPLAINT SEEKING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.

(Filed Apr. 20, 1955.)

Now comes the plaintiff, Dean Milk Company, an Illinois corporation, and presents its complaint against the defendants, George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee, and for cause of complaint shows:

1. That the defendant, George F. McCanless, is the duly elected and qualified Attorney General of the State of Tennessee and as such has the duty of enforcing the laws of the State; that the defendant, Buford Ellington, is the duly

appointed and qualified Commissioner of Agriculture of the State of Tennessee and as such has the duty, through and with the assistance of the Attorney General, of enforcing the laws falling within his Department of the State government; that the defendant, Murray T. Miles, is the State Dairy Commissioner, performing those duties in connection with the Department of Agriculture specifically within his division of that Department, including the enforcement of the laws regarding dairies, milk and milk products; that all of the defendants are residents of, located in and having their principal offices in the County of Davidson, State of Tennessee.

2. That the jurisdiction of the Court is based upon Sections 1332 and 1338 of Title 28 of the United States Code, establishing in this Court original jurisdiction to hear actions between persons residing in different states and involving more than three thousand and no/100 dollars ($3,000.00), and actions arising under the Constitution or laws of the United States and involving more than three thousand and no/100 dollars ($3,000.00); that this complaint seeks a declaratory judgment and injunctive relief as is provided for in Sections 2201 and 2202 of Title 28 of the United States Code; that the controversy arises under and involves Article I, Section 8, Clause 3, and Article VI, Section 2, of the Constitution of the United States, Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the Anti-Trust laws of the United States, Sections 1-26, Title 15, of the United States Code; that this controversy involves more than three thousand dollars exclusive of interest and costs.

3. That plaintiff, Dean Milk Company, is a corporation existing under and by the authority of the laws of the State of Illinois, with its principal place of business in Franklin Park, Illinois, and is engaged in the fluid milk business in the City of Memphis and its environs in the State of Ten-

nessee; that plaintiff owns and operates a milk processing and bottling plant at Conway, Arkansas, and is engaged in the fluid milk business in the States of Arkansas, Illinois, Kentucky, Missouri, Indiana and Wisconsin; that since October 19, 1952, plaintiff has been and is now engaged in distributing and selling fluid milk and milk products to retail stores in the City of Memphis and its environs, and that such sales of fluid milk by plaintiff, Dean Milk Company, have, in large part, been made through its distributor, Ray C. Schutt, doing business as "Dean Milk of Memphis"; that the plaintiff desires and intends to engage in the fluid milk business in other marketing areas in the State of Tennessee; that said fluid milk business as carried on by the plaintiff constitutes interstate commerce in that it consists of the purchase of fluid milk and cream from producers in Arkansas, Missouri, Oklahoma, Illinois, Wisconsin and Tennessee, transporting said fluid milk and cream to Conway, Arkansas, commingling the same, and then pasteurizing and bottling said milk in paper containers at plaintiff's processing and bottling plant at Conway, Arkansas, and then transporting said fluid milk and milk products for sale to retail stores in Memphis and its environs; that there is thus a continuous flow of fluid milk and cream from producers, through the bottling and processing plant of the plaintiff, to retail stores for sale to the ultimate consumers thereof, which altogether constitutes interstate commerce in fluid milk and cream originating in states other than Tennessee; that the gross volume of business of Dean Milk Company in distributing and selling milk and milk products in Memphis, Tennessee, and its environs is in excess of $70,000.00 per month.

4. That the General Assembly of the State of Tennessee, on February 22, 1955, enacted a law entitled "An Act to Regulate the Sale of Milk and Milk Products"; that the said law was approved by the Governor of the State of Tennessee on February 23, 1955, and the law by its express

terms has been in effect from and after its passage; that a true and correct copy of said law (sometimes referred to hereinafter as H. B. No. 389) is attached to this complaint as Exhibit A and by this reference is incorporated herein and made a part hereof.

5. That Sections 1, 2, 3 and 4 of H. B. No. 389, and each of them, violate the Constitution of the United States and the Constitution of the State of Tennessee, as is more fully set out hereinafter; that the plaintiff, Dean Milk Company, has been notified by officials of the State of Tennessee charged with the enforcement of H. B. No. 389 that the statute applies to the business of plaintiff, Dean Milk Company, and that the defendants have been and are threatening to enforce the provisions of H. B. No. 389 against plaintiff, Dean Milk Company; and that H. B. No. 389 constitutes a present and existing threat against the business and officers and agents of the plaintiff in the sale of fluid milk and milk products in interstate commerce to persons located within the State of Tennessee, and is a present and existing barrier against plaintiff's intentions to engage in the fluid milk business in other areas in the State of Tennessee.

6. That H. B. No. 389 contains no statement of any legislative purpose, and that the law is unreasonable, arbitrary and capricious and bears no real or substantial relation to any legitimate or proper purpose and constitutes an unnecessary and unwarranted interference with the individual liberty of the plaintiff; that the statute does not purport to regulate the quality of milk or milk products or in any way to protect the health and welfare of the people of the State of Tennessee by preventing the sale of impure or improperly processed or misbranded fluid milk or milk products; that the statute is not designed to promote competition or regulate competitive practices so as to benefit the health and welfare of the people of the State of Tennessee, but is instead promotive of monopoly and unreasonably

high prices, all in derogation of the best interests of the people of the State of Tennessee.

7. That H. B. No. 389, by delegating to milk processors or manufacturers engaged in business of selling at wholesale or retail fluid milk and milk products in the State of Tennessee at the date of the enactment of the said bill or thereafter first entering a marketing area complete and unfettered control over the price at which fluid milk or milk products may be sold by plaintiff in areas in which said processors and manufacturers are doing business, creates the power to exclude or prevent free competition or the entry into any marketing areas by plaintiff or any person engaged in the business of selling fluid milk or milk products, such as plaintiff, and thereby creates in such processors and manufacturers a monopoly in violation of Article I, Section 22, of the Constitution of the State of Tennessee.

8. That the statute delegates to the processors and manufacturers engaged in the selling of fluid milk and milk products in any market area in the State of Tennessee the power to legislate and fix prices in any manner said processors and manufacturers see fit; that no standard or guide or limitation on said power to legislate wrongfully delegated to said processors and manufacturers is established in H. B. No. 389; that the Legislature, in enacting H. B. No. 389, has unconstitutionally abdicated and delegated its legislative powers to private persons in violation of Sections 1 and 3 of Article II of the Constitution of the State of Tennessee; that the Legislature has abandoned its proper functions and delegated to the Commissioner of Agriculture, with no proper standards to guide or limit the Commissioner, the power to designate and establish "marketing areas" as referred to in H. B. No. 389; that said law gives no consideration to the quality or grade of the competitive products sold; that no standard is established by which plaintiff can determine what constitutes "prevailing price" as referred to in H. B. No. 389.

9. That H. B. No. 389 deprives the plaintiff, Dean Milk Company, of its liberty, privileges and property without due process of law; that the Legislature, in enacting H. B. No. 389, has unlawfully delegated to private persons the right to control and regulate the manner and method in which plaintiff may engage in the sale of fluid milk or milk products and the right to control the disposition of property by the plaintiff and to make any disposition of such property by the plaintiff other than that permitted from time to time by said undeterminate group of private persons a crime, and that the said law is so vague that it provides no reasonable standard so that plaintiff or any other person similarly situated can determine what conduct may be construed to be violative thereof all in violation of Amendment Fourteen, Section 1, of the United States Constitution, and Article I, Section 8, and Article XI, Section 8, of the Tennessee Constitution.

10. That said statute, H. B. No. 389, is further unconstitutional in that it (a) unlawfully and without due process of law deprives any processor or manufacturers charged with a violation thereof of the presumption of innocence until proven guilty; and (b) of the constitutional right of such processor or manufacturer to refrain from testifying in a criminal matter against his own interests, all in violation of Section 1 of Amendment XIV and Amendment V of the United States Constitution.

11. That the business of the plaintiff in the sale of fluid milk and milk products to persons located within the State of Tennessee constitutes interstate commerce; and that the power to regulate interstate commerce is vested in the Congress of the United States by Article I, Section 8, Clause 3, and Article VI, Section 2, of the Constitution of the United States; that the Congress of the United States has completely occupied the field of regulating pricing practices and other trade practices in interstate commerce by the

enactment of Sections 1-26 of Title 15 of the United States Code; H. B. No. 389 is in direct conflict with and contravention of the provisions of the Constitution and statutes above mentioned and is a direct burden upon interstate commerce; that discounts, rebates, advertising allowances and other pricing practices which the Congress of the United States has established as proper trade practices are arbitrarily precluded by H. B. No. 389.

Wherefore, plaintiff prays the Court for a judgment, declaring:

1. The statute, H. B. No. 389, unconstitutional and void and without effect as to the business of the plaintiff or others similarly situated;

2. That the defendants, their agents and attorneys be enjoined from enforcing or seeking to enforce or commencing any actions for the enforcement of the statute, H. B. No. 389; and

3. That the plaintiff have such other relief as it may be entitled to in the premises.

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United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation,
Plaintiff,
v.
George F. McCanless, Attorney General of the State of Tennessee, et al.,
Defendants.

Civil Action.
File No. 2015.

ORDER.

(Received for Entry Oct. 10, 1955.)

In this cause, upon motion of the plaintiff and by consent of the parties, paragraph 2 of the complaint is amended by deleting from the first sentence thereof Section 1338 of Title 28 of the United States Code and adding in lieu thereof Sections 1331 and 1337 of Title 28 of the United States Code.

Elmer D. Davies,
United States District Judge.

Robert W. Sturdivant,
Attorney for Plaintiff.

James M. Glasgow,
Attorney for Defendant.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation,
Plaintiff,

v.

George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee,
Defendants.

Civil Action.
File No. 2015.

MOTION TO DISMISS.
(Filed May 10, 1955.)

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court has no jurisdiction over the subject matter.

3. To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in controversy is less than $3,000.00 exclusive of interest and costs.

Knox Bigham,
Knox Bigham,
Assistant Attorney General, State of Tennessee,

James M. Glasgow,
James M. Glasgow,
Assistant Attorney General, State of Tennessee,

Supreme Court Building,
Nashville 3, Tennessee,

Attorneys for Defendants.

NOTICE OF MOTION.

To: McConnell, Lutkin, Van Hook and Paschen,
Attorneys for Plaintiff,
134 So. LaSalle Street,
Chicago, Illinois.

Please take notice that the undersigned will bring the above motion on for a hearing before this Court at the court room in the United States Courthouse in Nashville on the 23 day of May, 1955, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Knox Bigham,
Knox Bigham,
Assistant Attorney General, State of Tennessee,
Supreme Court Building,
Nashville 3, Tennessee,
Attorney for Defendants.

I certify that I have served a copy of this Motion and Notice on Attorneys for plaintiff by mailing a true copy of the same to McConnell, Lutkin, Van Hook and Paschen, 134 So. LaSalle Street, Chicago, Illinois, this 9 day of May, 1955.

/s/ Knox Bigham,
Knox Bigham,
Assistant Attorney General.

(Seal)

Filed
May 10, 1955
L. B. Ormes, Clerk,
By: S. E. Wasson, D. C.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation,
Plaintiff,

v.

George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee,
Defendants.

Civil Action.
File No. 2015.

ORDER ON MOTION.

(Received for Entry Aug. 4, 1955.)

This cause came on to be heard before the Honorable Elmer Davies, Judge, upon motion of defendants to dismiss the complaint filed in the cause, and after argument of counsel the Court was pleased to overrule said motion and grant to the defendants thirty days from the date hereof to further plead to said complaint with leave granted said defendants to rely upon the grounds of said motion in their answer; and it is accordingly so Ordered, Adjudged and Decreed:

And it further appearing to the Court that there is herein involved the constitutionality of a statute of the State of Tennessee, the Court is of the opinion that it is proper that the matter be heard before a three-Judge Court pursuant to Section 2281 of Title 28 of U. S. Code Annotated; it is accordingly ordered that the cause be set

for hearing in due course before a Court consisting of three Judges.

Entered at Nashville this 4th day of August, 1955.

Elmer D. Davies,
United States District Judge.

Robert W. Sturdivant,
Attorney for Plaintiff.

Knox Bigham,
Attorney for Defendants.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation, Plaintiff, v. George F. McCanless, Attorney General of the State of Tennessee, et al., Defendants.	Civil Action. File 2015.

ANSWER.
(Filed Aug. 31, 1955.)

Come now the defendants, George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee, and for answer to the complaint filed against them in this cause, say:

I.

Plaintiff has failed to state a claim upon which relief can be granted.

II.

The Court has no jurisdiction over the subject matter, because:

1. There is no justiciable controversy between the parties.

2. Plaintiff is not adversely affected by House Bill No. 389, the same being Chapter 74 of the Public Acts of Tennessee of 1955.

3. The amount in controversy is less than $3,000.00, exclusive of interest and costs.

4. Plaintiff seeks only an advisory opinion based upon a hypothetical state of facts.

III.

Defendants are not advised as to the details of the manner in which plaintiff conducts its business, but insofar as

plaintiff's allegations with reference to such details are relevant to this suit, demand strict proof of the same.

IV.

Defendants admit the passage of Chapter 74 of the Public Acts of Tennessee of 1955, but deny that any of defendants has instituted any action against plaintiff for violation of said Act, and further deny that any of defendants has threatened to institute such action.

V.

Defendants deny that Chapter 74 of the Public Acts of Tennessee of 1955 is unconstitutional for any of the reasons stated in the complaint, and insist that it is a valid and constitutional enactment in every respect.

Knox Bigham,
Assistant Attorney General, State of Tennessee,

James M. Glasgow,
Assistant Attorney General, State of Tennessee,

Supreme Court Building,
Nashville 3, Tennessee.

This is to certify that a copy of this Answer has been served upon counsel for plaintiff by mailing the same to McConnell, Lutkin, Van Hook & Paschen, Attorneys at Law, 134 South LaSalle Street, Chicago, Illinois.

Knox Bigham,
Assistant Attorney General, State of Tennessee.

(Seal)

Filed
Aug. 31, 1955
L. B. Ormes, Clerk
By: S. E. Wasson, D. C.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation,
Plaintiff,

v.

George F. McCanless, Attorney General of the State of Tennessee, et al.,
Defendants.

Civil Action.
File No. 2015.

APPLICATION FOR PRELIMINARY HEARING.

(Filed Sept. 8, 1955.)

Come now the defendants and make application that the defenses numbered I and II in their answer be determined before trial.

Knox Bigham,
Assistant Attorney General,

James M. Glasgow,
Assistant Attorney General,

Supreme Court Building,
Nashville 3, Tennessee.

I certify that I have served a copy of this application upon counsel for plaintiff by mailing the same to McConnell, Lutkin, Van Hook & Paschen, 134 So. LaSalle St., Chicago, Illinois; Chandler, Shepherd, Heiskell & Williams, 1711 First National Bank Bldg., Memphis, Tennessee Trabue & Sturdivant, Nashville Trust Bldg., Nashville, Tennessee.

Knox Bigham,
Assistant Attorney General.

(Seal)

Filed
Sept. 8, 1955
L. B. Ormes, Clerk
By: S. E. Wasson, D. C.

State of Tennessee, }
County of Davidson. }

This is to certify that the foregoing consists of a full, true and correct copy of the Complaint, except for Exhibit A to the same, which is a copy of Chapter 74 of the Public Acts of Tennessee of 1955 and is not copied herein, and other pleadings and orders on file in this Court in the case of Dean Milk Company v. George F. McCanless et al., Docket No. 2015, and that said case is now pending.

Witness my hand and the Official Seal of this Court this the 8th day of December, 1955.

L. B. Ormes,
Clerk,
By S. E. Wasson,
(Seal) Deputy.

This is to certify that L. B. Ormes was at the time of the execution of the foregoing certification the duly appointed, qualified and acting Clerk of the U. S. District Court for the Middle District of Tennessee, and that S. E. Wasson, whose genuine signature appears above, was at such time his duly appointed, acting and qualified Deputy, and that the foregoing attestation is in due form.

William E. Miller,
(Seal) Judge, U. S. District Court for the
Middle District of Tennessee.